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LEGAL RESPONSIBILITY

AND

ACCOUNTABILITY.

BY

SIMON STERNE, Esq.,

OF THE NEW YORK BAR.

READ BEFORE THE

MEDICO-LEGAL SOCIETY

OF THE

CITY OF NEW YORK,

At the Regular Meeting of the Society, November 26th, 1873.

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Legal Responsibility and Accountability.

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American law, both in its criminal and civil branches, is unsatisfactory in its methods of dealing with those subjects which are *quasi* of a metaphysical character. The penalty that we perhaps pay for the intensely practical nature of our Anglo-Saxon mind, and the great material achievements which are its resultant, is, that when we come to deal with intricate and delicate questions, we lack the subtlety and patience necessary for their mastery, and hence fail to organize a body of laws upon such subjects in con formity to what their natures require.

I use the words "responsibility" and "accountability" with the object of drawing attention to a distinction not etymologically inherent in the words themselves, but one which exists in fact; and I, therefore, during the course of my remarks, shall give to these words an arbitrary meaning, for the purpose of elucidating my ideas. Responsibility, in this essay, shall mean a man's answerableness for his acts to society at large, *i. e.*, amenability to criminal law; and "accountability," his answerableness to individuals arising from his obligations, expressed or implied, either under contract or from his status in society, such as husband, son, servant, trustee.

Every man of mature years is properly held both responsible and accountable for his acts, upon grounds both of public safety and private weal.

The basis of penal law is the substitution of punishment by the public for private vengeance. Society is inconceivable to us without the element of authority or command. Even in so simple a form as the *curiæ* or a single family, authority is its basis. Responsibility is coupled with the right to issue commands, and exacting, on pain of punishment, obedience thereto.

In the primitive ages of humanity these punishments were uncertain and capricious. Founded, however, upon an imperative need

of society, they followed the manners, the customs, the prejudices of the institutions they were called upon to protect. But everywhere the idea which was at the bottom was the substitution of public for private vengeance, and this substitution did not, until modern times, take absolute control of the whole field of crime, as is indicated by feuds, vendettas and reprisals, which have reached down to recent times, and indeed in some parts of the world still exist. I myself witnessed in Dalmatia a scene which showed that there the right of the vendetta was recognized even until recent years. A circle was formed wherein the elders of the village took seats; the younger ones stood around with heads bared in respectful silence. A crime had been committed: the member of one family murdered the member of another family, and the elder member of the family from which a member had been torn by the murder was permitted to draw some blood from the murderer in expiation.

The first change probably came through the priesthood; the men who committed murder or pillage made expiatory sacrifice to appease the vengeance of the gods, and the priests were consulted as to reprisals, recapture, and restitution. A custom thus grew up, of which government availed itself of forms and modes of restitution; the law *lex talionis* was probably originally but a rude form of vengeance. The eye for an eye, the tooth for a tooth, was probably but the mere formulization by government of a natural instinct of revenge. Even Greek and Roman law recognize this *lex talionis*, and have made it part of their penal law. The many fines for crimes was the first substitution for this rude form of the law of reprisal, and this was carried by the Germans of Tacitus to the utmost extreme—they had a sum to represent almost every species of crime as damage to the injured party.

The development among each people or each nation of a central authority created the tendency for the substitution of public for private vengeance.

This authority, whatever it was, owed protection and redress to the offended party, and revenged him.

Of course, in the event of these respective mulcts or fines not being paid, personal penalties were inflicted, which varied from absolute slavery to years of servitude for the benefit of the injured party.

When you take into consideration that originally the state avenged the individual wronged, that only by revenging him could

it induce that individual to refrain from reprisal by his own hands, it will explain the cruelty of all penal codes down to the present day.

The limit to the pain, governments would accordingly inflict, is but the limit which men, in their savage state, would recoil from inflicting upon their personal enemies.

At Athens stoning to death, crucifixion, burning alive, were penalties inflicted not only for a murder, but for treason, cowardice in face of the enemy, some kinds of theft, profanation of mysteries or sacrilege. At Rome the condemned were precipitated from the Tarpeian Rock, sewn in a sack and thrown into the Tiber or the sea, burned alive, crucified, thrown to wild, ferocious beasts, the tongues of criminals were torn out, and they were frequently castrated. In the middle ages it seems as though all the ingenuity which, at a subsequent period, was used to invent machinery to supply man's wants, was then applied to the discovery of human torture.

In France alone there were one hundred and fifteen different crimes punishable with death, and many forms of inflicting the death penalty. Burnings to death, horrible mutilations were numerous, splitting open of lips, cutting off of noses, ears, hands, feet, and castration were common penalties.

It was not until the eighteenth century that some change came, and that simultaneously with the discussion of the rights of man, although Locke, and Hobbes, and Vattel had written against the system. It was not until Beccaria published his pamphlet on crimes and their punishment in 1766 that this old system received its death blow. Beccaria, while denying the right of vengeance, still insisted that the repression of crime was the main justification of the State to act.

A modern school—which makes it the duty of the State to enforce the divine or moral law, and to punish as an all wise Creator is supposed to punish ; which seeks the justification of punishment in some fancied social contract, and is careful to look into motives—has grown up, and with its fanciful theories, its weak humanitarianism and exaggerated sentimentality, has well nigh made the repression of crime impossible.

If you will constantly bear in mind that the historical basis of all criminal law is the substitution of public vengeance for the

private vendetta, what will follow will appear less harsh than it otherwise might sound.

I admit that we should constantly bear in mind the possible improvement of the malefactor, also the effect which cruel and unusual punishments have upon the moral sense of the community; yet these are but subsidiary considerations; the main idea must always be that certainty of punishment which on the one hand will repress the crime, and on the other prevent the relapse into the state of the private exercise of the *lex talionis*.

Having said this much for the basis of criminal law, I shall now proceed to apply the principles historically derived, to the consideration of some of the questions of the day.

Men are to be held as responsible to the public for crimes to persons as they would be to the persons themselves, or their friends, were there no public or penal law. Motives are properly of primary importance as matter of moral law and moral codes, but are subsidiary considerations in matters relating to criminal law when the act is intended.

In all organized society, large classes of exceptions have been made from this general accountability and responsibility. The king, in monarchial governments, being the fountain and source of all law, is above it, and is therefore neither responsible nor accountable in the ordinary sense of those terms. Strangely enough, in our own country, the exemption of Government from suits has its origin in the same principle. Persons acting under compulsion, when that compulsion is sufficiently powerful, have been held not to be accountable, and their responsibility under such circumstances is very much limited.

Persons who cannot properly be said to have any wills at all, to wit, idiots, are not accountable, and scarcely responsible. Persons of perverted wills, arising from mental diseases, or diseases which affect nerve centres to the extent of bringing the will under the control of something other than reason, are generally held to be neither accountable nor responsible.

It is of the latter class—the insane—that I wish to treat more especially this evening. As wide as is the range and breadth of diseases which affect the mental organization, and hence the will power, and as various as the forms that *dementia* may take, should be the different degrees of responsibility and accountability to

which that class of members of society should be held. And it is herein that the statute laws are glaringly defective—defects which have not by any means been supplemented by the wisdom or scientific attainments of the judges who apply them. There is scarcely any material difference between the class of evidence which is admissible to prove insanity on the part of a testator, and that which is listened to in a criminal court to prove insanity on the part of a murderer; and yet the mental defect which might and should affect the testamentary power of a citizen, ought not in the slightest degree to affect his responsibility as a criminal. It is the unconscious perception of this fact on the part of the community which causes its members to regard with so much suspicion and contempt the, under proper restrictions, perfectly justifiable plea of insanity, when it is interposed in our criminal courts.

Even as to the question of responsibility, various degrees might be established, corresponding to different degrees of crime, holding those excusable only, for the most heinous of offences, who are *absolutely insane*, and who were unconscious of the act that they were doing, so as to make the act an accidental event, and, strictly speaking, not an act at all. Such a classification would necessarily and in itself exclude a vast mass of testimony which is now taken in our criminal courts upon the subject of insanity, and in future cause the inquiry to be confined to the one question, not whether the man was insane, but whether he had that degree of insanity which would render him incompetent to know the nature of the act with the committing of which he stands charged. It is thus, and thus only, that the law, in its administrative part, can take cognizance of, and keep pace with, the progressive advancement of medical science upon the subject of insanity.

It does not follow that that, which the physician, for purposes of his own, and for medical treatment, would call insanity, should be so classed by the law, except in instances where the man, for the performance of the highest trust with which society can charge him, should be in the full and free possession of all his faculties.

That nervous excitability and mental derangement, slight as it may be, which leads men to risk their all in desperate ventures—an excitability which even physicians would consider a very mild form of insanity—the law should take note of, if the person thus afflicted is a guardian of important trusts, and remove him from

such trusts, so that his mental peculiarity should not affect the safety of others ; and yet it would be manifestly absurd to say, that such trustee should be permitted to use the same kind of evidence, as an excuse for the murder of his ward, which the person desiring to remove him from the trust of guardian would adduce in support of his petition. Extreme as this case is, it illustrates my idea of the necessity of a proper classification of the law upon the subject of insanity.

Society has been at work, since it exists as such, to repress certain anti-social evils, of which robbery and murder are the rudest forms. To say that the insane should be exempted from the influences of these repressive tendencies, is to impliedly assert that the insane are not subject to the influences of fear, or hope of reward; and no one who has had much experience with them, and who has had their treatment in charge, but knows that they are—to a more limited extent, of course, than rational persons, still to a very considerable extent—influenced by fear of punishment and the hope of reward. To remove the fear of the punishment of the law from their imagination has, in itself, a tendency to increase outward manifestations of insanity, because one of the main motives to correct action is withheld from them. Few insane persons injure themselves with cutting instruments, because they have consciousness enough to know that the instrument will inflict a wound if misused, without the slightest regard to the mental condition of him who uses it. Criminal law should, with very rare exceptions, be quite as inexorable. The strange revolution that takes place in the feelings towards friends and relatives on the part of persons suffering from some forms of mental disease, which causes them to regard with enmity and hatred those whom they should love and cherish, which causes them to disinherit the very people for whom they have laboriously accumulated fortunes, should cause a court to set aside a will made by such a person, on the ground that thus the injury done by the insane person can be set right, and the knowledge of that fact deter others similarly suffering from making such wills. But, for the selfsame reason, a criminal judge should sentence to the gallows him who, under such a delusion, poisons some dear friend. The knowledge of that fact would have a deterring influence even upon some other one, suffering from the same delusion, from the committing of the like crime.

Under certain barbarous forms of society it is almost a matter of course that you will kill your enemy, and that your enemy, with equal opportunity, will kill you. It is only in process of years and by slow stages that society has reached the point of overcoming the barbarians in its midst, and preventing its members from gratifying passion or seeking revenge by such a method. The insane person is upon that point a barbarian. He imagines his friend to be his enemy. But his insanity goes no farther. If permitted by the law to kill his enemy, he will do so. If deterred from it by the fear of punishment, by the knowledge that in killing his enemy he endangers his own life, many lives would be, or in any event may be saved. Anything that involves a *plan* on the part of the insane person which embraces the calculation of probable events sufficient to enable the criminal also to take into consideration the probable event that he himself will be hung, should be punished precisely as though the person were sane. A crime, however, committed by one unconscious of *the act itself* cannot in any sense be considered a crime; it is a mere accident, and the person who unconsciously commits it is blameless. The man who in a fit strangles another, without being conscious of the fact that he is strangling, is blameless. The man who in a paroxysm kills another without the intent of doing the other any injury, and there being no ill-will between them of any kind which would justify the presumption of any such intent, is blameless. Mary Lamb, who killed her mother, committed no crime. At the time of the act she did not know that it was her mother. She did not know that she was killing. She did not even know that she was injuring her. It was a curious and, though a natural, certainly a mistaken tendency, which until very recently had taken possession of the medico-legal mind, to suppose that the refinements of physicians upon the subject of mental diseases should necessarily be taken cognizance of by the criminal courts; and many a judge refrained from rigorously excluding testimony which was improperly offered, from the motive, doubtless, that he feared that he might be suspected by scientists to be behind the age. There is but little justification, I apprehend, for the complacency and self-satisfaction with which our *pseudo*-enlightened medical legal jurists look upon the rigorous common law with its simple test of insanity in criminal cases, viz: whether the man was laboring under such an hallucination that he was unconscious of the consequences of his acts.

A statutory enactment regarding the grades of insanity, which shall or shall not leave men accountable for their acts, as between man and man, and responsible for their acts to the community, would lead to a classification of insanity by its effects upon acts for purposes of the law, in addition to a medical classification by groups of symptoms for pathological investigation, and for curative purposes. The objection that would be raised by medical men is, that such classification would not be scientific, but that objection is just to this extent illogical, that it assumes that there is no scientific classification other than that which is adopted for medical scientific treatment. Jurisprudence is a science, having for its objects the preservation of society, the substantiation of human rights, the redress of wrongs, and the enforcement of the social law of *status*, and if, for its purposes, it adopts a classification based upon acts, instead of forms of disease, and groups together widely different and diverse objects, from the medical standpoint, it deals scientifically from a juridical point of view, quite as much so as when it deduces rights and remedies from the relation of husband and wife, and parent and child, without regard to the differences physiologically and psychologically, of the people of the community who enter into or find themselves in such relations. I have before observed that wherever a motive exists, however slight it might appear to the judge before whom the case is tried, or the jury who are to give a verdict, the law should act rigorously and inexorably. No uncontrollable frenzy causes people to dash out their brains, because of some slight self-reproach, by beating their heads against a stone wall, if they do not intend to commit suicide; and that arises simply from the knowledge of all men, however rude their instincts, that natural inanimate objects pay no regard, in their effects, to the frame of mind in which the man may be. It is just the savagery which such mental conditions exemplify, that society has been striving for centuries to overcome, and members of society who are seized by such frenzies should be put out of it. It would be amazing to anyone were the history of some rude, savage people ever written, how innumerable the instances that we would then have recorded of desperate atrocities from what would seem to us very trivial causes by people who are not insane.

The classification upon the matter of accountability and responsibility would be about as follows: The first class should be com-

posed of such persons who should be removed from trusts, and comprise all who suffer from idiosyncrasies so marked that they border upon insanity. Under the second class—persons who are not fully accountable—may be comprised those who suffer from melancholy, hysterics, incipient monomania, and all such as suffer from intermittent attacks of nervous diseases, also all epileptics and drunkards who, although they can frequently tell beforehand when they are liable to their fits of epilepsy or drunkenness, are nevertheless placed in frames of mind during their freedom from attacks which makes them in part non-accountable. As part of the interdiction to enter into contracts, there should be an absolute prohibition to those who suffer from hereditary or transmissible diseases to enter the marriage state. When we consider the vast misery inflicted upon subsequent generations, the deterioration of the race, and the lowering of its average of strength and wholesomeness by the adoption of the *laisse faire* principle upon that point by Government, very grave doubt may be entertained whether Government has not neglected an obvious duty in this regard, without a compensating advantage ; and all of this class should be incapacitated from making executory contracts, except with the consent of a guardian—but all of this class should be held strictly responsible.

The third class would be comprised of such who suffer from incipient stages of softening of brain, lunacy, and monomania of a virulent type, also all cases of chronic, progressive, and incurable intermittent nervous disorders. With the members of this class their whole accountability should cease, and their responsibility be limited to felonies only.

The fourth class includes idiots, incurable lunatics, those who suffer from dementia senilis, apoplectica, and dementia paralytica. In such cases both accountability and responsibility should be presumed to cease ; a presumption rebuttable, however, in the case of felonies committed, by proof of the making of a plan indicating calculation of probable events.

This classification, insufficient and tentative as it is, is nevertheless, to my mind, an indicator of the true method of the future progress of juridical reform in dealing with the question of accountability and responsibility.

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